

PROCEDURAL CHECKLIST

(Annotated)

**Post-Conviction Relief
Procedural Checklist--Annotated**

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STEP 1: Is the assignment of the petition correct?

- A. "On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course." Utah R. Civ. P. 65C(f).
- B. If the assignment is not correct, ensure that the clerk assigns the petition to the appropriate judge. If the assignment is correct, then continue on to Step 2.

STEP 2: Has the petitioner paid the full filing fee or, in the alternative, filed an affidavit of impecuniosity?

- A. If the court determines that the full filing fee of \$360 has been paid, see Utah Code Ann. § 78A-2-301(1)(a), then proceed to Step 3.
- B. If the full filing fee has not been paid and the petitioner has not filed an affidavit of impecuniosity as required by Section 78A-2-302(2), then the court should request the petitioner to supply an affidavit of impecuniosity and wait to proceed until the affidavit is received.
- C. If an affidavit of impecuniosity has been filed, then the court must immediately send a letter to the inmate accounting department of the correctional institution where the petitioner is being detained to obtain a financial account statement. See Utah Code Ann. § 78A-2-305(1)(a); Form 1: Letter Requesting Petitioner's

Account Statement.

- D. Once the financial account statement is received, the court must review the affidavit of impecuniosity and the account statement to independently determine whether the petitioner is capable of paying all the regular fees and costs associated with filing the petition. See Utah Code Ann. § 78A-2-305(2)(a)-(b).
- 1) If the court concludes that the petitioner is able to pay full fees and costs, then the petitioner should be ordered to make the required payment before the court proceeds on the petition.
 - 2) If the court concludes that the petitioner is unable to pay full fees and costs, then “the court shall assess an initial partial filing fee equal to 50% of the [petitioner’s] current trust account balance or 10% of the [petitioner’s] six-month aggregate disposable income, whichever is greater.” Utah Code Ann. § 78A-2-305(3).
- E. If an initial partial filing fee is assessed, the court must notify the petitioner in writing:
- 1) of the initial partial filing fee;
 - 2) the procedure, found in Section 78A-2-307, for challenging the initial filing fee assessment;
 - 3) that the petitioner has an ongoing obligation to make monthly payments until the entire filing fee is paid regardless of whether he prevails on his post-conviction petition; and
 - 4) that payment of the initial fee is required before the court may proceed with the petition.
- See Utah Code Ann. § 78A-2-306(1)(a)-(c) and (2); Form 2: Notice of Determination of Filing Fee and Stay of Proceedings.
- F. If a fee challenge is received, assess the challenge pursuant to Section 78A-2-307.
- G. Once the initial partial filing fee is paid in full to the clerk of the court, or the court determines, following a fee challenge, that the case should proceed forward even though the petitioner has not paid the initial partial filing fee, see Utah Code Ann. §§ 78A-2-306(2) and -307(3), the previously imposed stay of proceedings should be lifted. See Form 3: Notice of Receipt of Initial Partial Filing Fee and Lifting of Stay of Proceedings; Form 4: Notice of Waiver of Initial Partial Filing Fee and Lifting of Stay of Proceedings; Form 5: Order of Garnishment.
- H. Proceed to Step 3.

STEP 3: Initial review of the petition--should any claims be summarily dismissed?

- A. Once the initial partial filing fee is received (or waived), Rule 65C requires the

court to review the post-conviction petition and summarily dismiss any claim that is frivolous on its face or that has been adjudicated in a prior proceeding. Utah R. Civ. P. 65C(g)(1).

- 1) Rule 65C requires the petitioner to set forth in the petition all claims for relief and, in plain and concise terms, all of the facts that form the basis for each claim. See Utah R. Civ. P. 65C(c)(3).¹
 - 2) The purpose of the initial review is simply to “ensure that the petitioner [has] pleaded each element of the relief [being] sought.” Moench v. State, 2002 UT App 333, ¶7, 57 P.3d 1116.
- B. The PCRA only applies if the petitioner is challenging his conviction or sentence for a criminal offense and he alleges grounds for relief consistent with the requirements of the PCRA.² See Utah Code Ann. §§ 78B-9-102 and -104.

¹Rule 65C(c)(1)-(6) sets forth all of the requirements for the content of the post-conviction petition. In addition, subsection (d) authorizes the petitioner to attach affidavits and copies of opinions, pleadings, and orders to the petition.

²Section 78B-9-104 lists the grounds for relief that are permissible under the PCRA:

(1) Unless precluded by Section 78B-9-106 or 78B-9-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner’s counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received; or

(f) the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:

(i) the rule was dictated by precedent existing at the time the petitioner’s conviction or sentence became final; or

(ii) the rule decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted.

Utah Code Ann. § 78B-9-104(1)(a)-(f).

- 1) If the petitioner is not challenging his conviction or sentence, or if he is seeking to correct his sentence, is challenging actions taken by the Board of Pardons and Parole, or is claiming that he is innocent of the crime for which he is convicted, then the PCRA does not apply. See Utah Code Ann. § 78B-9-102(2) and -104(3).

C. A claim is frivolous on its face when,

based solely on the allegations contained in the pleadings and attachments, it appears that: (A) the facts alleged do not support a claim for relief as a matter of law; (B) the claims have no arguable basis in fact; or (C) the petition challenges the sentence only and the sentence has expired prior to the filing of the petition.

Utah R. Civ. P. 65C(g)(2)(A)-(C). This includes claims that are “facially implausible.” See Gardner v. Galetka, 2007 UT 3, ¶25, 151 P.3d 968.

- 1) To determine whether “a post-conviction petition is frivolous, [the] trial court need only determine whether the petition contains sufficient facts to state a cause of action.” Moench v. State, 2002 UT App 333, ¶7, 57 P.3d 1116.
- 2) A claim may be meritless, but not frivolous on its face. Such claims cannot be summarily dismissed.

D. A previously adjudicated claim is one that has already been raised and rejected in a prior proceeding, for example, during the direct appeal.³ See Carter v. Galetka, 2001 UT 96 at ¶6, 44 P.3d 626 (“[I]ssues raised and disposed of on direct appeal of a conviction or sentence cannot be raised again in a petition for [post-conviction relief and] . . . are dismissed as an abuse of the writ, without a ruling on the merits.”).

- 1) Pursuant to Rule 65C(c)(4)-(5), the petitioner must inform the court of previous rulings and proceedings involving petitioner’s case.
- 2) If the petitioner has failed to inform the court of previous rulings and proceedings in the case, the court may return the petition to the petitioner with instructions to amend the petition within 20 days and provide the court with

³Notwithstanding the mandate of Rule 65C, there is some confusion concerning the summary dismissal of claims previously raised and rejected on appeal. On the one hand, in nearly every post-conviction case that addresses an initial post-conviction petition, the Utah Supreme Court has stated that any issue previously raised on appeal cannot be relitigated on collateral review. On the other hand, in the case of Hurst v. Cook, 777 P.2d 1029 (Utah 1989), and in other cases addressing successive post-conviction petitions, the Supreme Court has repeatedly indicated that issues previously raised on appeal (or in a prior post-conviction petition) can be relitigated if unusual circumstances are shown. See id at 1037 (“[A] prior adjudication of the same ground for relief is sufficient to bar relitigation on that ground, absent unusual circumstances.”). It is simply unclear why petitioners in successive post-conviction petitions may raise unusual circumstances to relitigate a previously adjudicated issue, but petitioners filing initial post-conviction petitions cannot.

the necessary information.

E. Following the initial review, proceed to Step 4.

STEP 4: Procedures following the initial review of the petition--what orders need to be entered and should counsel be appointed?

A. Procedure for claims that are summarily dismissed:

- 1) The court must promptly issue an order dismissing the claims.
 - a) The order need not recite findings of fact or conclusions of law, but it must indicate whether the claim is frivolous on its face or has been previously adjudicated;
 - b) The order must be sent by mail to the petitioner. See Form 6: Order of Summary Dismissal of Claims.
- 2) Once the order of dismissal is entered, proceedings on the claim are terminated.
 - a) If all of the claims are dismissed, then the court must issue an order dismissing the petition for post-conviction relief itself. See Form 7: Order Dismissing Petition for Post-Conviction Relief.

B. Procedure when there are claims that have not been summarily dismissed:

- 1) If the petition includes claims that are not frivolous, but the petition nevertheless fails to set forth all of the facts “in plain and concise terms,” or is otherwise deficient or confusing, the court must return the petition to the petitioner with instructions to amend the petition within 20 days. See Utah R. Civ. P. 65C(g)(3).
 - a) Adherence to Form 47 of the Utah Rules of Civil Procedure will help to ensure that all of the requirements of Rule 65C are satisfied. See Utah R. Civ. P. 65C(b) (“The petition should be filed on forms provided by the court.”).
- 2) If the petition complies with the requirements of Rule 65C, the court must:
 - a) Enter an order or sign a minute entry that designates which claims are not dismissed;
 - b) Enter an order requiring the respondent to answer or otherwise respond within 30 days to the claims that have not been dismissed; and
 - c) Direct his or her clerk to mail a copy of the orders and petition, including any memorandum and attachments, to the respondent. See Utah R. Civ. P. 65C(h); Form 8: Oder Requiring Responsive Pleading from Respondent.
 - i) Service should be made to the following address:

Utah Attorney General, Criminal Appeals Division
P.O. Box 140854
Salt Lake City, Utah 84114-0854

- 3) The answer or other response filed by the respondent must be served upon the

petitioner (and counsel if one is appointed). If the respondent responds with a motion to dismiss or for summary judgment, the petitioner may respond to the motion by memorandum within 30 days. No other pleadings or amendments are permitted unless ordered by the court. See Utah R. Civ. P. 65C(i).

- 4) Appointment of counsel: Although “there is no statutory or constitutional right to counsel in a civil petition for post-conviction relief,” Hutchings v. State, 2003 UT 52, ¶20, 84 P.3d 1150, “the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner.” Utah Code Ann. § 78B-9-109(1).

- a) “In determining whether to appoint counsel, the court shall consider . . . whether the petition contains factual allegations that will require an evidentiary hearing . . . and . . . whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.” Utah Code Ann. § 78B-9-109(2)(a)-(b). See Form 9: Order Denying Request for Appointment of Counsel.

C. Once all of the pleadings have been filed, proceed to Step 5.

STEP 5: Consideration of the pleadings--are any of the claims procedurally barred or time-barred?

- A. Are any of the claims procedurally barred? A claim is procedurally barred if it (1) can still be raised on direct appeal or by a post-trial motion; (2) was raised or addressed at trial or on appeal; (3) could have been but was not raised at trial or on appeal; (4) was raised or addressed in any previous request for post-conviction relief; or (5) could have been but was not raised in a previous request for post-conviction relief. See Utah Code Ann. § 78B-9-106(1)(a)-(d).

1) Initial petition for post-conviction relief:

- a) If the claim was raised or addressed at trial or on appeal, then it is probably absolutely procedurally barred and should be dismissed “as an abuse of the writ.” Carter v. Galetka, 2001 UT 96 at ¶6, 44 P.3d 626. See also Kell v. State, 2008 UT 62, ¶17, 194 P.3d 913 (after opportunity to be heard on appeal, “[w]e presume that this court gave full consideration to the claims, regardless of whether [petitioner’s] counsel raised them in the most effective manner.”). But see Allen v. Friel, 2008 UT 56, ¶12, 194 P.3d 903 (in the context of an initial petition, “[w]hen the ground for preclusion is that the petitioner already addressed . . . the issue, the petitioner’s claim will not be allowed in a post-conviction relief proceeding absent unusual circumstances.”) (emphasis added); Lairby v. Barnes, 793 P.2d 377, 378

(Utah 1990) (same);

b) If the claim could have been, but was not, raised at trial or on appeal, then it should be dismissed unless:

i) The failure to raise the claim was due to the ineffective assistance of trial or appellate counsel. See Utah Code Ann. § 78B-9-106(3).

However, a “claim of ineffective assistance of counsel may not . . . be used simply to relitigate ‘under a different guise’ an issue already disposed of on direct appeal.” Gardner v. Holden, 888 P.2d 608, 615 (Utah 1994); or

ii) The petitioner demonstrates unusual circumstances justifying the failure to raise the claim. See Gardner v. Holden, 888 P.2d 608, 613 (Utah 1994) (“Issues that could and should have been raised on direct appeal, but were not, may not properly be raised in a [post-conviction] proceeding absent unusual circumstances.”). This requires a showing of an obvious injustice or a substantial and prejudicial denial of a constitutional right such that it would be unconscionable not to examine the alleged error to assure that substantial justice was done.

2) Successive petition for post-conviction relief:

a) If the claim was raised or addressed at trial, on appeal, or in a previous petition for post-conviction relief, then it should be dismissed unless unusual circumstances are shown. See Hurst v. Cook, 777 P.2d 1029, 1036 (Utah 1989) (in the context of a successive petition, the Supreme Court has held that a “ground for relief from a conviction or sentence that has once been fully and fairly adjudicated on appeal or in a prior habeas proceeding should not be readjudicated unless it can be shown that there are ‘unusual circumstances.’ For example, a prior adjudication is not a bar to reexamination of a conviction if there has been a retroactive change in the law, a subsequent discovery of suppressed evidence, or newly discovered evidence.”).

b) If the claim could have been, but was not, raised at trial, on appeal, or in a previous petition for post-conviction relief, then it should be dismissed unless:

i) The petitioner demonstrates good cause, see Utah R. Civ. P. 65C(c), or unusual circumstances. Tillman v. State, 2005 UT 56, ¶20, 128 P.3d 1123 (“Utah common law prohibits a petitioner from raising a post-conviction claim . . . when the claim could have been raised in a

prior post-conviction proceeding. However, we have consistently recognized exceptions to this general rule in ‘unusual circumstances’ where ‘good cause’ excuses a petitioner’s failure to raise the claim earlier.”).

(1) A showing of “good cause” may include, but is not limited to, any of the following:

(1) the denial of a constitutional right pursuant to new law that is, or might be, retroactive, (2) new facts not previously known which would show the denial of a constitutional right or might change the outcome of the trial, (3) the existence of fundamental unfairness in a conviction, (4) the illegality of a sentence, [and] (5) a claim overlooked in good faith with no intent to delay or abuse the writ.

Hurst v. Cook, 777 P.2d 1029, 1037 (Utah 1989).

(2) Before considering whether “good cause” or “unusual circumstances” exist that would excuse the petitioner’s failure to raise an issue that could have been raised in a prior proceeding, the court should first determine whether the petitioner has shown that the claim was not withheld for tactical reasons. See Gardner v. Galetka, 2007 UT 3, ¶26, 151 P.3d 968 (“‘[C]laims that are withheld for tactical reasons should be summarily denied.’ This language imposes a separate and distinct procedural determination for successive post-conviction claims that is made before we reach an analysis under the ‘good cause’ common law exceptions.” (quoting Hurst v. Cook, 777 P.2d 1029, 1037 (Utah 1989))).

ii) No ineffective assistance of counsel exceptions apply to claims raised in a successive post-conviction petition, even for ineffective assistance of post-conviction counsel. See Utah Code Ann. § 78B-9-109(3).

B. Is the petition timely?

- 1) The PCRA requires that any claim in an initial or a successive post-conviction petition must be filed within one year after the cause of action accrued. See Utah Code Ann. §§ 78B-9-106(1)(e) and -107. No exception applies under the PCRA for filing an untimely post-conviction petition.
- 2) Equitable tolling provisions: even though there are no exceptions that would excuse the failure to file a timely petition, two tolling provisions apply under the PCRA:

- a) The statute of limitations is tolled during the pendency of a petition asserting exoneration through DNA testing under Section 78B-9-303, or factual innocence under Section 78b-9-401. See Utah Code Ann. § 78B-9-107(4).
- b) If the petitioner can show by a preponderance of the evidence that the “limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity,” Utah Code Ann. § 78B-9-107(3), then the court must take into account the period of time tolled in assessing the timeliness of the petition.
- 3) After taking into account any period of time tolled under the tolling provisions, if the court determines that the petition was not filed within one year after the cause of action accrued, then the petition is time-barred and should be dismissed.
 - a) Caveat: Under the common law, if the petitioner can establish unusual circumstances or good cause to relitigate a claim or that excuses the failure to raise an issue in a prior proceeding, then “no statute of limitations may be constitutionally applied to bar [the post-conviction] petition.” Julian v. State, 966 P.2d 249, 254 (Utah 1998). The “mere passage of time can never justify continued imprisonment of one who has been deprived of fundamental rights, regardless of how difficult it may be for the State to reprosecute that individual.” Id.

C. After considering the pleadings, proceed to Step 6.

STEP 6: Procedure after considering the pleadings--should any of the claims be dismissed, should the court convene an evidentiary hearing, and should the petitioner be present during any hearings?

A. Dismissal of claims:

- 1) If the respondent has filed a motion to dismiss or a motion for summary judgment and the court believes that oral argument should be heard on the motion, then a hearing date should be scheduled.
- 2) If the court finds that the claims raised in the petition are procedurally barred, time-barred, or otherwise meritless, and no exceptions or unusual circumstances exist, then the court should issue a memorandum decision granting the respondent’s motion and dismissing the post-conviction claims.

B. Procedures when a claim is not dismissed:

- 1) If an evidentiary hearing is necessary to receive additional evidence on a claim, the court should schedule a hearing date.

- 2) If a party requests that discovery be permitted and the court determines that there is “good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing,” Utah R. Civ. P. 65C(l), then the court may allow discovery. However, “the requirement . . . for a determination that discovery is necessary to discover relevant evidence that is likely to be admissible at an evidentiary hearing is a higher standard than is normally used in determining motions for discovery.” Utah R. Civ. P. 65C, Advisory Committee Note.

C. Presence of the petitioner at court hearings:

- 1) The petitioner must “be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceedings.” Utah R. Civ. P. 65C(k).
- 2) If, at some point, an evidentiary hearing becomes necessary and the petitioner is not represented by counsel, then he must be present at the prehearing conference, if one is scheduled. However, the prehearing conference may be conducted by means of telephone or video conferencing. Utah R. Civ. P. 65C(k).
- 3) Cost of transporting the petitioner: “If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.” Utah R. Civ. P. 65C(n).

D. Proceed to Step 7.

STEP 7: Final disposition

- A. After fully considering the claims that survived the respondent’s motion to dismiss or motion for summary judgment,
 - 1) if, for any claim, the court concludes that the petitioner has failed to establish that “there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, [when] viewed with the evidence and facts introduced at trial or during sentencing,” Utah Code Ann. § 78B-9-104(2), then the court must deny relief on the claim;
 - 2) if, for any claim, the court concludes that the petitioner has established a reasonable likelihood of a more favorable outcome, either with respect to his conviction or sentence, the court may either modify the original conviction or sentence or vacate the original conviction or sentence and order a new trial or sentencing proceeding. See Utah Code Ann. § 78B-9-108(1).
 - a) If the court vacates the original conviction or sentence, the court is

required to “enter findings of fact and conclusions of law and an appropriate order.” See Utah R. Civ. P. 65C(m)(1).

i) “If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action.” Utah R. Civ. P. 65C(m)(1); Utah Code Ann. § 78B-9-108(2)(a).

(1) If notice is not provided or notice is provided indicating that no action will be taken, then the stay will expire and “the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.” Utah R. Civ. P. 65C(m)(2); Utah Code Ann. § 78B-9-108(2)(b).

(2) If notice is provided that the petitioner will be retried or resentenced, “the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matter that may be necessary and proper.” Utah R. Civ. P. 65C(m)(1) Utah Code Ann. § 78B-9-108(2)(d).